No. 11,238

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEREFA MALOOF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF FOR APPELLANT.

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OPENING BRIEF FOR APPELLANT.

The appellant, convicted in the District Court for the Northern District of California of violating the Emergency Price Control Act of 1942, and sentenced to pay a fine of $300 and to be imprisoned in the county jail for a period of sixty days, has duly appealed to this Court upon an assignment of errors, and upon the clerk's record of proceedings, without a bill of exceptions, pursuant to the provisions of Rule 8 of the Criminal Appeals Rules.

JURISDICTIONAL STATEMENT.

The statutory provisions which sustain the jurisdiction are as follows:

(1) **The Jurisdiction of the District Court.**

U.S.C.A., Title 28, section 41 subdivision 2. This section provides that the District Courts shall have original jurisdiction of "all crimes and offenses cognizable under the authority of the United States." Also, the *Constitution of the United States, Amendment 6:*

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

(2) **The Jurisdiction of this Court upon Appeal to Review the judgment in question.**

U.S.C.A., Title 28, section 225:

> "The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions,—
>
> "**First,** in the District Court, in all cases save where a direct review of the decision may be had in the Supreme Court, under section 345 of this Title."

(3) **The pleadings necessary to show the existence of jurisdiction:**

(a) The Indictment (R. 2.)

(4) **The facts disclosing the basis upon which it is contended that the District Court had jurisdiction and that this Court has jurisdiction upon appeal to review the judgment in question:**

These facts are set forth in the introductory sentences to this brief and will be stated more fully

in the ensuing abstract of the case. Accordingly, in the interest of brevity, and to avoid repetition, statement thereof is here omitted.

ABSTRACT OF THE CASE.

The information filed against appellant by the United States Attorney for the Northern District of California, omitting the caption, is as follows (R. 2):

"INFORMATION.

(Emergency Price Control Act of 1942, as amended; Title 50 U.S.C.A. App., sections 902, 904(a) and 925(b).)

Leave of Court being first had, Frank J. Hennessy, United States Attorney for the Northern District of California, comes, and for the United States of America, informs this Court: THAT

ZEREFA MALOOF,

(hereinafter called 'said defendant') on or about the 15th day of December, 1945, in the City and County of San Francisco, State of California, in the Southern Division of the Northern District of California and within the jurisdiction of this Court, did unlawfully, wilfully and knowingly rent to B. E. Wood and R. D. Sullivan a certain room in a hotel and rooming house, to-wit, Room No. 11, Hotel Rosslyn, 44 Eddy Street, City and County of San Francisco, State of California, for a rental price of $5.00 per night for two persons, which said sum of $5.00 per night for two persons was higher than the maximum price fixed by law, said maximum price then and there being

> $2.00 per night for two persons, as the said defendant then and there well knew. (Regulations for Hotels and Rooming Houses, 9 F. R. 11322.)"

The appellant pleaded not guilty to the charge and thereafter, on January 15, 1946, the cause came on regularly to trial before the Honorable William Healy, United States Circuit Judge, sitting as a District Judge. After the taking of testimony, the jury returned a verdict of guilty, and appellant was sentenced to serve sixty days in the County Jail and pay a fine of $300.00. From this judgment and sentence she has appealed to this Court. Pursuant to an order made by the trial Court under the provisions of Rule 8 of the Criminal Appeals Rules, the appeal is prosecuted upon an Assignment of Errors and the Clerk's Record of the proceedings without a bill of exceptions. (R. 8.)

SPECIFICATION OF THE ASSIGNED ERRORS RELIED UPON.

Assignment of Error No. 1. (R. 7.)

ARGUMENT.

1. SUMMARY.

The only point relied on for a reversal of the judgment is that the information failed to state facts constituting a crime and was insufficient to confer jurisdiction on the District Court for each of the following reasons:

(a) The offense sought to be charged can only be committed by one of a particular class of persons. The information fails to allege that defendant was a person belonging to that class.

(b) The information fails to charge, as a fact, what was the maximum price fixed by law (regulation) for the rental of the room.

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2. GENERAL PRINCIPLES OF LAW RELATING TO INDICTMENTS AND INFORMATIONS.

Neither the testimony or other portions of the record can be resorted to for the purpose of supplying a necessary allegation missing from the charge.

Fontana v. United States, 262 Fed. 283.

A Federal Criminal Court can only acquire jurisdiction by the filing of a sufficient charge of crime in such Court.

Albrecht v. United States, 273 U.S. 1, 8, 71 L. ed. 505, 509.

A material fact cannot be supplied by way of recital, or by inference, intendment, or implication:

> "The fact must be charged and charged distinctly. We cannot by inference fill out an incomplete charge."
>
> *United States v. Morrissey,* 32 Fed. 147, 151;
> *Danaher v. United States,* 39 F. (2d) 325.

> "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense

must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially or by way of recital."

United States v. Hess, 124 U.S. 486;

Pettibone v. United States, 148 U.S. 197, 202, 37 L. ed. 419, 423;

Asgill v. United States, 60 Fed. (2d) 780;

Harris v. United States, 104 F. (2d) 4.

The purpose of an indictment or information, among other things, is to inform the Court of facts from which the Court can determine whether a crime has been committed:

"The object of the indictment is, * * * second, to inform the court of the facts alleged, so it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone."

United States v. Cruikshank, 92 U.S. 542, 23 L. ed. 588, 593;

United States v. Hess, 124 U.S. 483, 487, 31 L. ed. 516, 518.

Where the law, under which an accused is prosecuted, is enacted in general terms, or generally provides that under varying circumstances different acts may constitute a violation thereof, an indictment or information is not sufficient if merely worded in the language of the law. The particulars must be stated:

"In criminal cases, prosecuted under the laws of the United States, the accused has the consti-

tutional right 'to be informed of the nature and cause of the accusation.' Amend. VI. In U.S. v. Mills, 7 Pet., 142, this was construed to mean, that the indictment must set forth the offense 'with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;' and in U. S. v. Cook, 17 Wall. 174 (84 U.S. XXI, 539), that 'Every ingredient of which the offense is composed must be accurately and clearly alleged.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species; it must descend to particulars.' "

United States v. Cruikshank, supra;

Asgill v. United States, 60 F. (2d) 780, 784.

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3. **THE INFORMATION WAS INSUFFICIENT TO STATE A CRIME OR TO CONFER JURISDICTION ON THE DISTRICT COURT, IN THAT IT FAILS TO ALLEGE THAT DEFENDANT WAS OF THE CLASS OF PERSONS GOVERNED BY THE REGULATION.**

Assignment of Error No. 1. (R. 7.)

That the information in the above entitled cause does not state facts sufficient to charge this defendant with any crime or offense against the United States of America.

The indictment contains no allegation that the appellant was the owner, the lessee, the proprietor, or

the manager of the hotel and rooming house mentioned in the information or that she had any connection therewith at all. Obviously, there must be a relationship of landlord and tenant; the crime can only be committed by one in possession of a hotel or rooming house and engaged in the operation of the same or such person's agent. This is apparent from the Regulation parenthetically mentioned at the conclusion of the information, to-wit, "Regulations for Hotels and Rooming Houses". 9 *Fed. Regis.* 11322, sec. 13, subdivision (a), par. 9 provides:

> " 'Landlord' includes an owner, lessor, sublessor, assignee, or other person receiving or entitled to receive rent for the use or occupancy of any room or an agent of any of the foregoing."

It is not alleged in the information that the defendant was any of these things, or that she was receiving or entitled to receive, rent for the use or occupancy of the room mentioned in the information. If she was not, the Regulation had no application to her.

Where a crime can only be committed by a particular class, the indictment must show on its face that the defendant belonged to that class by direct averment, and such fact cannot be supplied by inference or intendment. Many decisions pronounce this rule, but we need not go further than *Johnson v. United States* (CCA-9), 294 Fed. 753. The indictment in that case was far better as a pleading than the information in the case at bar because it alleged, in general terms, that the defendant was a person belonging to the class involved, while here there is not

even a general averment that defendant was of the class covered by the regulation. Nevertheless, this Court held that the indictment did not charge a crime and reversed the judgment. The late Judge Rudkin, who wrote the opinion of the Court, uses the following language (at p. 755):

> "* * * Again, the averment that the plaintiff in error was a person required to register is a naked conclusion of law at best. If he did certain things, or engaged in certain activities, he was required to register as a matter of law; and, if he did none of these things, he was not. As we have already seen, the court below was of the opinion that no person can possess narcotics lawfully without registration, and it would be going a long way indeed to presume that the grand jury did not fall into the same error. The question of the sufficiency of a similar indictment was reversed by this court in Bacigalupi v. U. S. (C.C.A.) 274 Fed. 367. In Pendleton v. U. S., supra, it was held that a like indictment was defective. A contrary ruling seems to have been made without discussion in Miller v. U. S. (C. C. A.) 288 Fed. 816. **But it would seem upon principle, as well as upon authority, that where a crime can only be committed by a particular class of persons, the indictment should show upon its face that the defendant belonged to that class, by direct averment, not as a mere conclusion of law;** for example, it would not be sufficient, in an indictment for illegal voting, to charge that the defendant was not a qualified voter, without setting forth the grounds of disqualification. Quinn v. State, 35 Ind. 485, 9 Am. Rep. 754. So in a prosecution for failure to register under the Selective Service Act (Comp. St.

§§ 2044a-2044k) we apprehend it would not be sufficient to charge that the defendant was required to register. The indictment or information should go further, and show that he was one of the particular class mentioned in the statute."*

In *U. S. v. McCormick,* 28 Fed. Cases 1060, 1062, Cas. No. 15,663, it is said:

> "It has been correctly contended on the part of the traverser, where an act is by statute forbidden to be done by persons of a certain description, an indictment, grounded on such statute, must by a substantive averment, bring the traverser within that description * * *. It was necessary therefore that the indictment should state by a direct allegation that the traverser was such a minister at the time when the offense is charged to have been committed."

See also, 42 *C. J. S.,* p. 1019, and cases cited in note 91.

In the instant case the information fails to allege that defendant was of the class governed by either the statute or regulation. It may be argued, as the information charges that defendant rented the room in question, that from this the inference can be drawn that she was one of the persons named in the regulation and so connected with the hotel that she had the power of renting rooms and collecting rent therefor. However, a material fact cannot be supplied by either inference, intendment or implication. Such fact must be directly charged and alleged.

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*All emphasis appearing in quotations from cases have been supplied by the writer.

From all that appears from the information defendant had nothing whatever to do with the operation of the hotel and therefore was not one of the persons governed by the regulation.

The information must be tested in the light of the rule that appellant is presumably innocent and has no information or knowledge of the facts charged against her. (*Fontana v. United States,* 262 Fed. 283.)

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4. **THE INFORMATION FAILS TO ALLEGE AS A FACT WHAT WAS THE MAXIMUM PRICE FIXED BY LAW FOR THE RENTAL OF THE ROOM.**

Assignment of Error No. 1, supra.

The information charges that defendant rented the room in question for $5.00 "which said sum of $5.00 per night for two persons was higher than the maximum price fixed by law, said maximum price then and there being $2.00 per night for two persons." (R. 2.) Here follows a parenthetical reference to the OPA regulation governing rents for hotel and rooming houses as printed in 9 Federal Register 11322.

The naked allegation that the sum was higher than the maximum price fixed by law is a mere conclusion of the pleader. Any allegation which does no more than state that an act was in violation of law or contrary to law or in excess of a limit fixed by law, is not an allegation of fact but the statement of a legal conclusion.

United States v. Minnec, 104 Fed. (2d) 575;
Middlebrooks v. United States, 23 Fed. (2d) 244;
Broadus v. United States, 30 Fed. (2d) 394;
United States v. Horton, 282 Fed. 731.

Before an information charging one with violating the maximum price regulation for the rental of rooms can be sufficient it must be alleged as a fact—not as a mere conclusion—what was the maximum price fixed by law for such rental, and this must be done by setting forth such facts as are necessary to establish such maximum price. The mere allegation that the sum of $2.00 was the maximum price is but the conclusion of the pleader.

The parenthetic reference to the Regulation For Hotels and Rooming Houses does not supply the foregoing deficiency. As stated above the purpose of the accusatory pleading is to enable the Court to determine whether or not a crime has been committed (*United States v. Cruikshank,* supra; *United States v. Hess,* supra), and in doing so the Court can take judicial knowledge of such regulations as are published in the Federal Register, but **if the regulation itself conveys no information to the Court, the Court is powerless to make such determination and in such circumstances the information is insufficient and void.**

The regulation referred to in the information contains nothing from which the Court could ascertain the maximum rental that lawfully could be charged

for room 11 in the Hotel Rosslyn. We print in the margin pertinent portions of such regulation.*

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*SEC. 4. *Maximum rents.* This section establishes separate maximum rents for different terms of occupancy (daily, weekly or monthly) and numbers of occupants of a particular room. Maximum rents for rooms in a hotel or rooming house (unless and until changed by the Administrator as provided in section 5) shall be:

(a) *Rented or regularly offered during maximum rent period.* For a room rented or regularly offered for rent during the thirty days ending on the maximum rent date, the highest rent for each term or number of occupants for which the room was rented during that thirty-day period, or, if the room was not rented or was not rented for a particular term or number of occupants during that period, the rent for each term or number of occupants for which it was regularly offered during such period.

(b) *First rented or regularly offered after maximum rent period.* For a room neither rented nor regularly offered for rent during the thirty days ending on the maximum rent date, the highest rent for each term or number of occupants for which the room was rented during the thirty days commencing when it was first offered for rent after the maximum rent date; or, if the room was not rented or was not rented for a particular term or number of occupants during that period, the rent for each term or number of occupants for which it was regularly offered during such period.

(c) *First rent after maximum rent date where no maximum rent established under* (a) *or* (b). For a room rented for a particular term or number of occupants for which no maximum rent is established under paragraphs (a) or (b) of this section the first rent for the room after the maximum rent date for that term and the number of occupants, but not more than the maximum rent for similar rooms for the same term and number of occupants in the same hotel or rooming house.

* * * * * * *

(g) *Rent fixed by order of Administrator.* For a room for a particular term or number of occupants for which no maximum rent has been established under any other provision of this regulation, the rent fixed by order of the Administrator as provided in this paragraph (g).

The Administrator at any time on his own initiative or on petition of the landlord may enter an order fixing the maximum rent and specifying the minimum services for a room for a particular term or number of occupants for which no maximum rent has been established prior to issuance of the order under any other provision of this regulation. Such maximum rent shall be fixed on the basis of the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum rent date.

There is no allegation in the information that the room in question was rented or regularly offered for rent during the maximum rental period; there is no allegation as to the highest rent for the room during the thirty-days mentioned, or any period of time, nor is there any averment that the Administrator ever made any order fixing the maximum rent for the room; in short, no facts whatever are stated to show what was the maximum rental.

It should be alleged what the rental of the room was during the last thirty days that it was rented, or, if it had not been rented at all, what the maximum rent was for similar rooms for the same term and number of occupants in the same rooming house or, that the Administrator had, prior to the time mentioned in the information, made an order fixing the maximum rent. Because of the absence of any such averment the statement in the information that the rent alleged to have been charged was higher than the maximum price fixed by law is a naked conclusion of the pleader. The information charges no crime and the Court below had no jurisdiction to proceed thereunder.

Where a duly promulgated regulation definitely fixes a ceiling price at which an article may be sold or a room rented, an indictment may be sufficient if it alleges this ceiling price and makes proper reference to the regulation; but **where the regulation does not fix a ceiling price and merely establishes various formulas for arriving at a ceiling price, variable under different circumstances and conditions, then the in-**

formation must descend to particulars and a mere allegation of the alleged ceiling price is insufficient.

In the case of *United States v. Johnson* (D. C.—Del.), 53 F. Supp. 167, various indictments for violating the Emergency Price Control Act were held insufficient for merely charging that the sale, made at a certain price, was in violation of the maximum price (stated in the indictment) established by certain regulations relating to the sale of poultry, which regulations provided a formula for arriving at the maximum price.*

The Court held the indictments insufficient, first, upon the general ground that an inspection of the statute, indictment and regulations did not permit either the defendants or the Court to tell what was the maximum selling price. At page 170 the District Judge states:

> "Sufficient facts of a crime committed must be stated in an indictment to support a conviction. Specifically, the court and defendants must be able to determine this from the indictment, the statutes and the pertinent administrative regulations passed pursuant to the statutes. If the facts alleged may all be true and yet appear to constitute no offense, the indictment is insufficient. Fontana v. United States, 8 Cir., 262 F. 283; Lynch v. United States, 8 Cir., 10 F. (2d) 947; United States v. Armour & Co., D.C., 48 F. Supp. 801; 27 Am. Juris. p. 621. * * * **It is impossible to**

*In the case at bar the regulation provides several formulas for arriving at different maximum prices at which the same rooms can be rented.

glean from the allegations of each indictment, the Act, and the regulations what, in fact, the ceiling price was for the commodity, notwithstanding that the prices mentioned in the indictments are the ceiling prices or are below the ceiling prices. Since the Act and the regulation do not establish any specific ceiling price for the commodity sub judice, defendants are entitled to know not only what the government claims the ceiling price to be, but also the manner in which it arrived at this conclusion."

Referring specifically to the indictments the District Judge, at page 171, states:

"It is manifest from this regulation that to determine ceiling price in a given situation, one must know (a) the buyer's 'customary receiving point'; (b) the freight charges from Chicago to the buyer's 'customary receiving point'; (c) whether the prosecution is for an alleged violation of the retail ceiling or of the wholesale ceiling; and (d) with respect to those transactions alleged to have been 'f.o.b.', the freight charges from the farm to the buyer's 'customary receiving point.' This is because the then regulation made no specific price ceiling for the different localities which are set forth in the indictments. The indictments simply set forth a ceiling price. But, in the indictments all the administrative symbols constituting the formula are left as unknowns."

Concluding on this point, the Court's language is:

"In short, I cannot tell from the indictments whether a crime has been committed—even if all the facts alleged are proved at trial. This alone renders the indictments insufficient."

On reargument, the judge adhered to his ruling stating, on page 173, as follows:

> "Since no ceiling price is fixed in Regulation 269, the indictment must show how the grand jury arrived at the ceiling price for the particular defendant, for, as I said before, a defendant should be permitted to take advantage of a faulty calculation before trial and consequently he should be informed of all material elements that go to make up the crime. I accordingly refuse to alter the result of my original opinion."

The foregoing case is peculiarly applicable to the case at bar. Here the regulation purporting to fix maximum rentals merely sets forth various means for computing such maximum rentals. Thus, section 4(a) provides for the maximum price for a room rented during the thirty days ending on the maximum rental date. Section 4(b) provides a different maximum for the same room if it was not rented during the thirty day period. Section 4(c) provides for the fixing of a maximum rental when the circumstances set forth in (a) and (b) do not exist. Section 4(g) provides for fixing of such rental by an order of the Administrator. Each of the foregoing formulas, if used, result in a different maximum rental for the same room.

The mere allegation that the maximum rental was two dollars per night for two persons is but the conclusion of the pleader. Neither Court nor counsel can determine from the statute, the regulations and the information, whether two dollars per night or five dollars per night was above, below or exactly equal to

the maximum price established by law. In fact, neither the statute nor the regulations establishes any maximum rental, all they do is to provide various methods of computation, to be used under varying conditions, for establishing such rental.

CONCLUSION.

For the errors herein assigned, it is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with directions to dismiss the information and to discharge the defendant *sine die.*

Dated, San Francisco, California,
May 24, 1946.

Respectfully submitted,
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